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JAN 17 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

0474

January 17, 1997

BY HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

Re: Petition for Rulemaking
Channel 294A
Pulaski, Tennessee

Dear Mr. Caton:

Transmitted herewith on behalf of D. Mitchell Self Broadcasting, Inc., are an original and four copies of its Request for Waiver of Procedural Policy, filed in connection with the above-referenced Petition for Rulemaking, which was filed with the Commission on June 26, 1996.

Should any questions arise concerning this matter, please communicate directly with this office.

Very truly yours,

FLETCHER, HEALD & HILDRETH, P.L.C.



Andrew S. Kersting
Counsel for
D. Mitchell Self Broadcasting, Inc.

Enclosures

cc (w/ encl.): Certificate of Service (by hand or first-class mail)

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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JAN 17 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Amendment of Section 73.202(b),) MM Docket No. _____
Table of Allotments,) RM No. _____
FM Broadcast Stations)
(Pulaski, Tennessee))

To: Chief, Allocations Branch

REQUEST FOR WAIVER OF PROCEDURAL POLICY

D. Mitchell Self Broadcasting, Inc. ("Self"), by counsel and pursuant to Section 1.41 of the Commission's rules, hereby requests a waiver of the Commission's procedural policy regarding the processing of rulemaking petitions that are contingent upon the licensing of facilities specified in an outstanding construction permit. In support of this waiver request, the following is stated:

I.

Background

On June 26, 1996, Self filed a petition for rulemaking ("Petition") seeking the allotment of Channel 294A to Pulaski, Tennessee, as that community's second local FM service and first competitive service. Self filed its Petition in response to the Commission's June 14, 1996, grant of an application filed by Big River Broadcasting Corporation ("Big River"), licensee of Station WQLT-FM, Florence, Alabama, proposing to downgrade Station WQLT-FM from Channel 297C to 297C1. *See* Public Notice, Report No. 43763 (released June 19, 1996). Big River filed a license application to cover the construction permit for the Channel 297C1 facility at Florence on June 17, 1996 (File No. BLH-960617KA). However, as explained in greater detail below, Big River

subsequently requested the dismissal of its license application for Channel 297C1 on December 4, 1996. See Public Notice, Report No. 43890 (released December 17, 1996). Self recognizes that because its Petition was filed prior to the grant of the license application for the Channel 297C1 facilities at Florence, its Petition is subject to return pursuant to the procedural policy announced in *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Cut and Shoot, Texas)*, DA 96-1901 (released November 18, 1996) (“*Cut and Shoot*”). Nevertheless, for the reasons stated below, Self respectfully requests that, due to the unique circumstances presented in this case, the Commission waive its procedural policy and hold Self’s Petition in pending status until a license application for Channel 297C1 at Florence, Alabama, is granted, or the final cancellation of the construction permit to downgrade WQLT-FM to Channel 297C1.

II.

Self’s Petition Is In Conflict With a Previously Dismissed Contingent Application

On March 22, 1996, H-M-S Broadcasting Co. (“H-M-S”) and Big River (collectively referred to herein as “Proponents”)¹ filed three applications with the Commission seeking minor changes in the facilities of Stations WDXE-FM, Lawrenceburg, Tennessee, and WQLT-FM and WXFL(FM), Florence, Alabama. As noted above, Big River sought to downgrade WQLT-FM’s facilities from Channel 297C to 297C1, proposing only a slight reduction in power and no change in the station’s transmitter site. Proponents claimed that the downgrade of Station WQLT-FM would permit Station WDXE-FM to move from Channel 240A to Channel 294A at Lawrenceburg, which, in turn, would

¹ H-M-S is the licensee of Station WDXE-FM, Lawrenceburg, Tennessee. In addition to WQLT-FM, Big River is the licensee of Station WXFL(FM), Florence, Alabama.

permit Station WXFL to upgrade from Channel 241A to Channel 241C2 at Florence.² Proponents' WDXE-FM application would be in conflict with Self's Petition seeking the allotment of Channel 294A at Pulaski.

On June 26, 1996, Self filed an Informal Objection to the WDXE-FM and WXFL applications alleging that they were contingent applications in violation of Section 73.3517 of the Commission's rules, and requested their dismissal. Proponents opposed Self's Informal Objection on July 3, 1996, contending that the contingent application rule did not apply to "integrally-related, interdependent applications filed as a single package." Proponents' Opposition to Informal Objection, p. 7.

By letter dated November 26, 1996 (reply ref: 1800B3-DEB/PHD) ("*Letter Ruling*"), the Assistant Chief, Audio Services Division, Mass Media Bureau ("Bureau"), determined that the "one-step" applications for construction permits for Stations WDXE-FM and WXFL were contingent applications in violation of Section 73.3517 of the rules, and, thus, were inadvertently accepted for filing. Accordingly, the Bureau dismissed the WDXE-FM and WXFL applications. Proponents filed a Petition for Reconsideration of the *Letter Ruling* on December 17, 1996, requesting that the Assistant Chief either reinstate the WDXE-FM and WXFL applications and continue processing them, or, alternatively, waive Section 73.3517 of the Commission's rules to permit "acceptance, processing and grant of the applications." Proponents' Petition for Reconsideration, p. 19.

² H-M-S sought to modify WDXE-FM's facilities to operate on Channel 294A with an increase in power to 6 kw at its current site. Big River sought to upgrade WXFL's facilities to operate on Channel 241C2 with a change in the station's transmitter site and a power increase.

III.
Grant of the Requested Waiver Is Necessary to Prevent
Proponents From Gaining Cut-Off Protection Against Self's Petition

Self has been advised by the staff of the Audio Services Division that it employs a general policy of accepting contingent applications (such as WDXE-FM's) upon the *filing* of a license application to cover a construction permit for the primary facility, *i.e.*, the facility upon which it is contingent. Thus, if Self's Petition were to be returned pursuant to the general policy announced in *Cut and Shoot*, Proponents could simply dismiss their pending reconsideration petition, re-file the WQLT-FM license application and construction permit applications for WDXE-FM and WXFL on the same date, and thereby provide the WDXE-FM application cut-off protection against Self's Petition. Self would have no opportunity to protect its Petition because the date upon which Proponents may elect to re-file their respective applications would be within their exclusive control, and Self would have no way of knowing the applications had been re-filed until they appeared on a subsequent public notice.

The circumstances presented by Self's Petition and the contingent applications filed by Proponents demonstrate not only the inconsistency between the *Cut and Shoot* policy and the Audio Services Division's policy of accepting contingent applications on the date the license application for the primary facility is filed, but also the inherent problems with applying the *Cut and Shoot* policy in the context of Self's Petition. Indeed, if the Allocations Branch were to apply its newly-adopted procedural policy and return Self's Petition,³ the only conceivable means by which Self could protect its interest in seeking the allotment of Channel 294A at Pulaski would be to re-submit

³ As noted above, Self's Petition was filed on June 26, 1996, nearly seven months before the procedural policy in *Cut and Shoot* was adopted.

its Petition every day for an indefinite period of time.⁴ Self submits that this is not a satisfactory means of ensuring that its Petition will be considered in connection with Proponents' applications.

On the other hand, if the Audio Services Division were either to adopt the *Cut and Shoot* approach or make an exception to its general policy and refuse to accept the contingent WDXE-FM and WXFL applications until the license application for WQLT-FM is granted, in order to preserve its rights under its Petition, Self would have to wait until shortly after the WQLT-FM license application is filed and then begin either (i) resubmitting its Petition on a daily basis until the grant of the license application appears on public notice, or (ii) calling the Audio Services Division's staff on a daily basis to ensure that its Petition is filed contemporaneously with the grant of the license application and the filing of the WDXE-FM and WXFL construction permit applications. Both of these alternatives would result in a waste of substantial resources of both Self and the Commission's staff. Therefore, although Self has been successful in challenging the contingent nature of the WDXE-FM and WXFL applications before the Audio Services Division, absent a grant of this waiver request, Self's efforts ultimately may be entirely negated by the *Cut and Shoot* policy unless Self undertakes the burdensome and grossly inefficient process of re-submitting its Petition each and every day.

Furthermore, grant of the requested waiver and retaining Self's Petition in pending status will not preclude Proponents from re-submitting the WDXE-FM and WXFL applications at the

⁴ The Bureau's November 26, 1996, *Letter Ruling* dismissed the WDXE-FM and WXFL applications without prejudice. Thus, Proponents may re-submit them upon a final resolution of Proponents' reconsideration request. Because Self has no way of knowing when those applications may be re-filed, Self would be required to re-submit its Petition indefinitely in order to preserve its rights under its Petition.

appropriate time, but, rather, merely ensures that Self's petition will be considered in conjunction with those applications.⁵ Indeed, if the proposed allotment of Channel 294A at Pulaski were to prevail under the Commission's Section 307(b) analysis, it is the residents of the Pulaski, Tennessee, area that would benefit, not Self. Although Self intends to file an application for the Channel 294A facility if its Petition is ultimately granted, there is no guarantee that its application will be granted or that Self will become the eventual permittee.

IV. Conclusion

As demonstrated herein, the mechanical application of the general procedural policy adopted in *Cut and Shoot* would preclude the acceptance of Self's Petition, even though it was filed *prior* to whatever future date the WDXE-FM and WXFL applications may properly be filed and accepted for filing. As a result, application of the *Cut and Shoot* policy to Self's Petition would raise procedural due process concerns and violate the spirit of *Ashbacker*⁶ because it would deprive Self of the opportunity of having its Pulaski proposal compared on a Section 307(b) basis with Proponents' applications. Therefore, in light of the unique circumstances surrounding Self's Petition, Self respectfully requests that its Petition be held in pending status until a subsequently-filed license application for Channel 297C1 at Florence, Alabama, is granted, at which time the Commission could then act on its Petition. Self acknowledges the indefinite nature of its request, but respectfully

⁵ Proponents' applications would be considered counterproposals to Self's Petition. See *Conflicts Between Applications and Petitions for Rulemaking to Amend to FM Table of Allotments*, 7 FCC Rcd 4917, 4919, n.18 (1992), *recon. granted in part on other grounds*, 8 FCC Rcd 4743 (1993).

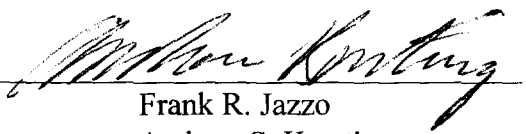
⁶ *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

submits that short of re-submitting its Petition each and every day, Self has no practical alternative means of preserving its rights under its Petition.

WHEREFORE, in light of the foregoing, D. Mitchell Self Broadcasting, Inc. respectfully requests that its Petition for Rulemaking, filed June 26, 1996, be HELD IN ABEYANCE pending a grant of a license application for Channel 297C1 at Florence, Alabama, or the final cancellation of the construction permit to downgrade WQLT-FM to Channel 297C1.

Respectfully submitted,

D. MITCHELL SELF BROADCASTING, INC.

By: 
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Its Counsel

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January 17, 1997

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CERTIFICATE OF SERVICE

I, Barbara Lyle, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C., hereby certify that on this 17th day of January, 1997, copies of the foregoing "Request for Waiver of Dismissal Policy" were hand-delivered or mailed first-class, postage prepaid, to the following:

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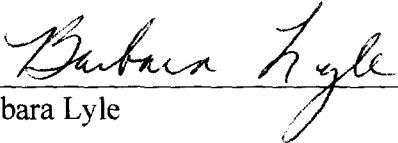
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